



JUDICIAL STANDARDS COMMISSION STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2016-01

November 18, 2016

QUESTIONS:

The Judicial Standards Commission issues this Formal Advisory Opinion with respect to two questions relating to ethical limits on the conduct of district court judges presiding over certain domestic matters involving self-represented litigants:

- 1) Is it ethically permissible for a judge to question a witness regarding the statutory factors in an uncontested divorce involving only *pro se* parties?
- 2) Is it ethically permissible for a judge to question a witness in a child custody determination involving only *pro se* parties if necessary to allow the judge to consider the relevant statutory factors to determine the best interests of the child?

CONCLUSION:

These questions relate to the limits on a trial judge's discretion to question witnesses during hearings to grant an uncontested divorce or make a child custody determination in cases involving only self-represented (*pro se*) litigants. This opinion does not address what additional ethical duties may apply in cases where only one party is proceeding *pro se* and the other is represented. Rule 614(b) of the North Carolina Rules of Evidence allows judges to engage in such questioning, and provides that the "court may interrogate witnesses, whether called by itself or by a party." The Commission advises that a judge may ethically question witnesses under Rule 614(b) in both uncontested divorce cases and custody determinations involving only *pro se* parties, so long as it is done so (1) in order to render a full and fair decision based on adequate,

reliable and credible evidence (Canon 3A(1) and (4)); (2) the questions and method of questioning are neutral and do not reasonably call into question the integrity or impartiality of the judge (Canon 2A and Canon 3); and (3) in asking the questions, the judge is “patient, dignified and courteous” (Canon 3A(3)). In addition, and as a general matter, use of Rule 614(b) may be beneficial to discharge the judge’s other ethical duties to maintain order and decorum in the courtroom (Canon 3A(2)) and to dispose promptly of the business of the court (Canon 3A(5)).

DISCUSSION:

Under North Carolina law, the trial judge must at times make findings of fact supported by the evidence in child custody determinations and divorce cases. N.C.G.S. Section 50-13.2(a) identifies the relevant factors in custody awards and provides that “[a]n order for custody must include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child.” A trial judge also must make certain factual findings in divorce cases under N.C.G.S. Section 50-6 (divorce after separation for one year) and N.C.G.S. Section 50-10 (requiring certain findings by the trial judge). In divorce and custody determinations involving only *pro se* parties, there is the risk that the evidence presented can either be confusing or fail to address each required statutory factor that must be considered by the trial judge. Under these circumstances, therefore, a judge may properly use the Rule 614(b) authority to fulfill his or her obligations under Canon 3A(1), which requires a judge to be faithful to the law, and Canon 3A(4), which requires the judge to accord each litigant a full opportunity to be heard according to law.

Despite the benefits of exercising Rule 614(b) authority to fulfill the judge’s duties under Canon 3A in these circumstances, there are several important limitations on questioning of witnesses in uncontested divorce cases and child custody cases involving only *pro se* parties. First, the judge in an effort to determine necessary facts should not offer legal assistance or advocacy on behalf of any self-represented party in violation of Canon 5F, which prohibits judges from practicing law. Second, the judge should not ask the questions in a manner that creates the appearance of bias in favor of a particular party in violation of Canon 2A and Canon 3, which both require the judge to conduct himself or herself in a manner that promotes impartiality in judicial decision-making. When judges are engaged in questioning of witnesses in these circumstances, therefore, judges must be vigilant in ensuring that the questions are neutral and fair and do not indicate a desire to provide legal assistance to or otherwise benefit a particular party. An explanation to the self-represented litigants as to why the judge must ask such questions is also permissible.

References:

North Carolina Code of Judicial Conduct Canon 1, Canon 2A, Canon 3A(1)-(5), Canon 5F
North Carolina Rule of Evidence 614(b)
N.C.G.S. Section 50-6
N.C.G.S. Section 50-10
N.C.G.S. Section 50-13.2(a)